

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD LEE KEITH,

Defendant-Appellant.

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UNPUBLISHED

August 21, 2007

No. 270873

Wayne Circuit Court

LC No. 05-009463-01

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321,<sup>1</sup> felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent prisons terms of ten to fifteen years for the manslaughter conviction, three to five years for the felon in possession conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions and sentence, but remand for completion of a sentencing information report departure evaluation.

**I. FACTS**

Defendant's convictions arise from a shooting outside of defendant's aunt's Detroit home on August 11, 2005. Witnesses testified that on August 10, 2005, some unidentified individuals fired several gunshots toward the home of Jacqueline Davis, who is defendant's aunt. In response, on August 11, 2005, defendant, who is known as "Red," and a few of his associates, including Edward Wade and Ladelle Lee Roosevelt Studvent, went to Davis's house "to protect" it "just in case the guys came back." According to Studvent and Davis, defendant brought guns to Davis's house. Davis and a neighbor, who lived directly across the street, testified that defendant and others fired the guns in the air and onto the ground.

Subsequently, the victim drove his car into the next-door driveway, got out of the car, walked over to one of the men in the group, and incorrectly referred to him as "Mo." None of

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<sup>1</sup> Defendant was originally charged with first-degree premeditated murder, MCL 750.316(1)(a).

the people knew the victim, and Davis indicated that the victim had no involvement with any neighborhood issues. According to Davis and Studvent, the victim then walked into the middle of the street and proclaimed to be God. The victim walked past three houses and allegedly threw rocks toward Davis's house but not intending to hit anyone. At that point, a man named "Little Red," who is a person other than defendant, got into the victim's car and backed it out of the driveway. The victim then walked back to his car, swung toward Little Red and missed, and Little Red struck him in the nose. Studvent testified that Little Red ran, the victim chased him, the two began fighting, and then five to six other men joined in beating the victim. Davis saw "a bunch of people stomping [the victim], jumping on his back stomping him." Studvent testified that defendant, who had the victim in a headlock, then shot the victim. Davis denied seeing the shooting.

A neighbor, who lived directly across the street from Davis, testified that she saw the victim get out of the car, walk down the street, and then start moving rapidly as eight to ten men from Davis's house started talking loudly, cussing, and chasing the victim. The neighbor did not see what occurred after the group caught the victim. She subsequently heard gunshots, saw people run toward Davis's house, and saw a person with a gun run to the side of Davis's house. She could not identify the shooter.

The police found the victim, who was missing his shirt and one shoe, in a lot across the street from Davis's house. The Wayne County deputy chief medical examiner testified that the victim died from a single gunshot wound in the chest. The police executed a search warrant at Davis's house and found a loaded semi-automatic 12-gauge shotgun, a loaded 44-Magnum, a loaded AK-47, and ammunition.

The defense argued that defendant was mistakenly identified as the shooter. In a statement made to the police, defendant denied shooting the victim. Defendant admitted that he brought an AK-47 and a 44-Magnum to Davis's house after it had been "shot up." Defendant admitted being at the scene of the brawl, but denied kicking the victim although others were stomping him. When asked the location of the 44-Magnum during the brawl, defendant stated, "I guess on the porch or outside." Defendant claimed that a person named "Mark" shot the victim. A 19-year-old defense witness testified that Edward Wade pointed a revolver at the victim, who was "going crazy," and directed him to leave.

## II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that the trial court abused its discretion by denying his motion for a new trial and evidentiary hearing, which was based on defendant's claim that he was denied the effective assistance of counsel at trial. We disagree.

### A. Standard of Review

This Court reviews a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). Whether defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law; we review the trial court's factual findings for clear error, and its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

## B. Analysis

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *Id.* at 663-664. A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant argues that defense counsel was ineffective for failing to interview and call several eyewitnesses who could have supported his defense. The failure to call a supporting witness does not inherently amount to ineffective assistance of counsel, and there is no “unconditional obligation to call or interview every possible witness suggested by a defendant.” *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998). Rather, decisions about what evidence to present and what witnesses to call are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). “In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel’s failure to call [the] witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding.” *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant claims that, before trial, he gave defense counsel the names of witnesses who would have testified that an individual named “Little Red” shot the victim and that a prosecution witness was untruthful. But defendant has not identified the witnesses, nor has he provided any proof that the proposed testimony of these unnamed witnesses would have actually been valuable to his defense. Consequently, defendant cannot establish a claim of ineffective assistance of counsel on this basis.

Defendant also argues that defense counsel was ineffective for refusing to question Studvent “regarding [a] bargain he struck with the prosecution involving dismissal of [a] drug charge in exchange for his testimony against [defendant].” Counsel’s decision concerning what questions to ask is a matter of trial strategy, which this Court will not evaluate with the benefit of hindsight.

Defendant has failed to provide any record support for his claim that Studvent “struck” “a bargain” with the prosecution in exchange for his testimony. As noted by the trial court, defendant does not affirmatively state that any agreement was made, but only that the prosecutor did not question Studvent about an agreement. Moreover, in an affidavit, the prosecutor averred that “[t]here was no agreement” between the prosecution and Studvent. She further averred that she was unaware of any outstanding drug charge against Studvent. There is simply no evidence to support defendant’s claim that the prosecution had an agreement with Studvent. Therefore, defense counsel was not ineffective for failing to question Studvent about the matter. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to advocate a meritless position).

For the reasons discussed, the trial court did not abuse its discretion by denying defendant's motion for a new trial on the basis that he was denied the effective assistance of counsel at trial.

### III. SENTENCING DEPARTURE

Defendant also argues that the trial court erred when it departed from the sentencing guidelines recommended sentence range of 43 to 86 months and sentenced him to ten to fifteen years' imprisonment for his voluntary manslaughter conviction. We disagree.

#### A. Standard of Review

Whether a factor exists is reviewed for clear error on appeal. *People v Babcock*, 469 Mich 247, 265, 273; 666 NW2d 231 (2003). Whether a factor is objective and verifiable is subject to review de novo. *Id.* The trial court's determination that objective and verifiable factors constitute a substantial and compelling reason to depart from the minimum sentence range is reviewed for an abuse of discretion. *Id.* at 265, 274; see also *People v Armstrong*, 247 Mich App 423, 424; 636 NW2d 785 (2001). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock, supra* at 274. In ascertaining whether a departure is proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

#### B. Analysis

Under the sentencing guidelines statute, the trial court must ordinarily impose a minimum sentence within the calculated guidelines range. MCL 769.34(2); *Babcock, supra* at 272. A court may depart from the appropriate sentence range only if it "has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure." MCL 769.34(3). A court may not depart from the guidelines range based on certain specified factors, including gender, race, ethnicity, national origin, or lack of employment, MCL 769.34(3)(a), nor may it base a departure on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight, MCL 769.34(3)(b).

Our Supreme Court has reiterated that the phrase "substantial and compelling" constitutes strong language intended to apply only in "exceptional cases." *Babcock, supra* at 257-258 (citation omitted). The reasons justifying departure should "keenly and irresistibly grab" the court's attention and be recognized as having "considerable worth" in determining the length of a sentence. *Id.* Only objective and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *Id.* at 257, 273. This means that the facts considered must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

In this case, the trial court did not file a departure evaluation form, but did state its reasons for departure on the record:

I'm going to grant the upward departure here for these reasons, one, the comments made by the prosecutor are very cogent in terms of his constant being involved with the law. I recognize to some degree that's in the guidelines, but he had the gun charge.

But moreover, look at the facts of this case, recognizing that he was found guilty of voluntary manslaughter, and I can't essentially make a factual record that goes beyond that without some admission or other matters that justify that, but I don't think that the scoring really justifies what occurred here. We had some young men for whatever reason already gathered on this street with the Defendant being a key part of bringing a carload of guns there, initially based on what I was hearing in the case because they were responding to something that happened at a house that belonged to his cousin or someone the night before and they were essentially setting up their perimeter of defense or offence [sic] or whatever you want to call it, I guess, in response to that. The deceased here, who I didn't realize lived on the street before and apparently had some mental problems, showed up on that street, drove up in a car, parked the car in the driveway and near where this group of men including the Defendant were, and got out of the car, left it there and then, you know, maybe in his own mind he might have felt that he was back home or something, I don't know, and then was walking down the street and he was acting in a bizarre kind of way. Somebody got in his car drove it up toward him and they end up in some kind of fight. And then this Defendant and the other people, whatever number there was, a significant number of person, came up on him and basically started beating him down. There's no way in the world that he could have defended himself against that number of persons and what they were doing to him. So one is led to believe that he was probably in a very helpless state regardless of what the jury said here when he was shot. And recognizing that even if they had beat him, I suppose, which shouldn't have been justified in the first place, there was no reason to shoot him, there was nothing that was there that would have justified that.

I'm going to sentence the Defendant above the guidelines for that reason.

The trial court relied on factors that are objective and verifiable, and the court did not abuse its discretion by finding that these factors amounted to substantial and compelling reasons to depart from the sentencing guidelines range. Defendant argues that the trial court impermissibly relied on factors already taken into account in the scoring of the guidelines. Although defendant was scored 25 points for OV 1 (aggravated use of a weapon), MCL 777.31(1)(a), five points for OV 2 (lethal potential of weapon), MCL 777.32(1)(d), 25 points for OV 3 (physical injury to a victim), MCL 777.33(1)(c), 15 points for OV 5 (psychological injury to a member of the victim's family), MCL 777.35(1)(a), 50 points for OV 6 (intent to kill or injure), MCL 777.36(1)(a), and ten points for OV 10 (exploitation of a vulnerable victim), MCL 777.40(1)(b), the trial court did not err by finding that the offense and offender characteristics that are unique to this voluntary manslaughter were not adequately reflected in the guidelines. In other words, as noted by the trial court, the factors did not adequately account for defendant's superfluous, unjustifiable, and unwarranted attack on the victim, and defendant's key role of bringing several loaded weapons to Davis's house to retaliate against others and then chasing

down, beating, and shooting an uninterested and defenseless party. Further, although defendant was acquitted of the higher offense of first-degree murder, a trial court is permitted to consider evidence presented at trial that the defendant committed another crime even if he was acquitted of that charge. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).

In sum, the objective and verifiable reasons justifying departure keenly and irresistibly grab one's attention and are of considerable worth in deciding the length of defendant's sentence. For the same reasons, the extent of the departure, 34 months, is proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *Babcock*, *supra* at 264, 272. Defendant is not entitled to resentencing.

We note, however, that, although the trial court articulated its reasons for departure on the record, it failed to complete the required sentencing information report departure evaluation. *Armstrong*, *supra* at 426. We therefore remand this case to the trial court for the limited purpose of performing the ministerial task of completing a departure evaluation. *Id.*

Affirmed, but remanded for completion of a sentencing information report departure evaluation. We do not retain jurisdiction.

/s/ Alton T. Davis

/s/ Bill Schuette

/s/ Stephen L. Borrello